UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Midwest Independent Transmission System Operator, Inc.	Docket Nos. ER05-6-061, ER05-6-070, and ER05-6-085
Midwest Independent Transmission System Operator, Inc. PJM Interconnection, LLC, *et al.*	Docket Nos. EL04-135-063, EL04-135-073, EL04-135-088
Midwest Independent Transmission System Operator, Inc. PJM Interconnection, LLC, *et al.*	Docket Nos. EL02-111-081, EL02-111-090, and EL02-111-105
Ameren Services Company, *et al.*	Docket Nos. EL03-212-077, EL03-212-086, and EL03-212 101

ORDER APPROVING PARTIAL SETTLEMENTS

(Issued July 3, 2007)

1. This order approves three separate partial settlements that fully resolve the Seams Elimination Cost Adjustment (SECA) charges between the settling parties. The settling parties filed these settlements in response to proceedings involving the implementation of SECA charges; SECA charges are intended to recover claimed lost revenues for the period December 1, 2004 through March 31, 2006, as a result of the elimination of through and out rates in the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) and PJM Interconnection, LLC (PJM) regions. The order finds that the three partial settlements are fair and reasonable and in the public interest, and generally finds that commenters' concerns regarding these settlements are speculative and premature.

Settlements

Docket No. ER05-6-061, *et al.*

2. On April 28, 2006, in Docket No. ER05-6-061, *et al.*, the Detroit Edison Company and DTE Energy Trading, Inc. (DTE Parties) and the Transmission Owner Settling Parties[1] filed a Settlement Agreement (DTE Settlement) resolving all SECA issues between them set for hearing in the above-captioned dockets.

3. Section 4.1 of the DTE Settlement establishes $2,780,221 as the DTE Parties' total SECA liability to the Transmission Owner Settling Parties, which represents 80 percent of the compliance filing charges. Since the DTE Parties have already paid in full their SECA charges as billed, the DTE Settlement provides that the DTE Parties will be paid refund amounts set forth in Attachment 1 to the agreement. Section 5.4 of the DTE Settlement states that it may be amended only by agreement in writing of all the settling parties, and the standard of review for any modifications to this settlement requested by a settling party that are not agreed to by all settling parties shall be the public interest standard under the *Mobile-Sierra* doctrine.[2] The standard of review for any modifications to the DTE Settlement requested by a non-settling party and the Commission will be the most stringent standard permissible under applicable law.

4. On May 3, 2006, American Municipal Power-Ohio, Inc. (AMP-Ohio) filed comments urging the Commission to accept the DTE Settlement only if either the DTE Settlement is modified to protect explicitly non-settling parties from additional charges resulting from this settlement, or if the settling parties expressly confirm in their reply comments that the DTE Settlement is not intended to result in the imposition of additional costs on non-settling parties. On May 5, 2006, Commission Trial Staff filed

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[1] The Transmission Owner Settling Parties consist of Exelon Corporation (on behalf of its operating subsidiaries Commonwealth Edison Company, Commonwealth Edison Company of Indiana, Inc. and PECO Energy Company), Dayton Power and Light Company, Duquesne Light Company, Allegheny Electric Cooperative, Inc., Baltimore Gas and Electric Company, PPL Electric Utilities Corporation, Pepco Holdings, Inc. (on behalf of its affiliates Potomac Electric Power Company, Delmarva Power and Light Company, and Atlantic City Electric Company), Public Service Electric and Gas Company, Rockland Electric Company, UGI Utilities, Inc., Virginia Electric and Power Company d/b/a Dominion Virginia Power, FirstEnergy Corp. (on behalf of Pennsylvania Electric Company, Metropolitan Edison Company, and Jersey Central Power and Light Company), and West Penn Power Company, Monongahela Power Company, and the Potomac Edison Company (all doing business as Allegheny Power).

[2] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Mobile-Sierra).*

comments in support of the DTE Settlement, and states that the DTE Settlement will not affect non-settling parties. On May 8, 2006, DTE Parties and the Transmission Owner Settling Parties filed reply comments confirming that the DTE Settlement is not intended to adversely affect non-settling parties.

5. On May 23, 2006, the Presiding Administrative Law Judge (Presiding Judge) certified the DTE Settlement to the Commission as a Contested Partial Settlement. The Presiding Judge states that there are no issues of material fact preventing certification since AMP-Ohio did not provide any factual evidence to show that it will be obligated to pay additional SECA charges as a result of the DTE Settlement. The Presiding Judge adds that AMP-Ohio's mere allegation that it may be adversely affected by the Settlement is not sufficient to raise a genuine issue of material fact. The Presiding Judge also finds that DTE Parties and the Transmission Owner Settling Parties provided assurance that AMP-Ohio would not be adversely affected by the DTE Settlement. In addition, the Presiding Judge notes that, under section 5.4 of the DTE Settlement, any proposed modification by a settling party not agreed to by all settling parties is subject to the public interest standard of review articulated in *Mobile-Sierra*, and the standard of review for any changes proposed by a non-settling party or the Commission shall be the most stringent permissible by law.

Docket No. ER05-6-070, *et al.*

6. On June 12, 2006, in Docket No. ER05-6-070, *et al.*, AMP-Ohio and American Electric Power Service Corporation, as agent for the Eastern Operating Companies[3] of American Electric Power Company (AEP) filed a Settlement Agreement (AMP-Ohio Settlement) resolving all SECA issues between them set for hearing in the above-captioned dockets.

7. Section 4.1 of the AMP-Ohio Settlement establishes $8,280,556 as AMP-Ohio's total SECA liability to AEP. In section 4.2 of the AMP-Ohio Settlement, AMP-Ohio represents that it has already paid invoiced SECA charges totaling $9,274,122 for the benefit of AEP. Thus, the AMP-Ohio Settlement provides that AEP will refund to AMP-Ohio $993,566, as set forth in Attachment A of the AMP-Ohio Settlement. Section 5.4 of the AMP-Ohio Settlement provides that it may be amended only by agreement in writing of all the settling parties, and that the standard of review for any modifications to the AMP-Ohio Settlement requested by a settling party that are not agreed to by all settling parties shall be the public interest standard under the *Mobile-Sierra* doctrine. Section 5.4

[3] The AEP Eastern Operating Companies consist of Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, and Wheeling Power Company.

of the AMP-Ohio Settlement also provides that the standard of review for any modifications requested by a non-settling party and the Commission will be the most stringent standard permissible under applicable law.

8. On June 19, 2006, FirstEnergy Service Company, on behalf of its affiliated public utility operating companies,[4] (collectively, FirstEnergy) filed comments on the AMP-Ohio Settlement. FirstEnergy asks that the AMP-Ohio Settlement be modified to include language that: (1) bars AEP from collecting the refund amount from any load serving entities (LSEs) or load within the Midwest ISO and PJM regions; (2) bars AEP from collecting any amounts that AEP otherwise could have collected from AMP-Ohio in excess of the claimed amount such as may occur through settlement or a future Commission order; and (3) clarify that AEP waives its right to collect Green Mountain Energy Company's (Green Mountain) SECA obligation that AEP otherwise could have collected from AMP-Ohio from its various sub-zones throughout the Midwest ISO but for the AMP-Ohio Settlement.

9. On June 16, 2006, Commission Trial Staff filed comments in support of the AMP-Ohio Settlement. Commission Trial Staff states that the AMP-Ohio Settlement does not affect the amount of lost revenue any other transmission owner may claim against any other party to this proceeding, and does not affect any potential defense any other party may have to any claimed lost revenue responsibility.

10. On June 21, 2006, AMP-Ohio and AEP filed reply comments opposing FirstEnergy's proposed modification. They argue that their settlement does not adversely affect non-settling parties, including other LSEs in the Midwest ISO and PJM regions, and that it is intended only to resolve remaining issues among AMP-Ohio and AEP. They add that FirstEnergy does not raise a genuine issue of material fact demonstrating that FirstEnergy's load could be adversely affected by their settlement. On July 12, 2006, AMP-Ohio and AEP filed an errata to the AMP-Ohio Settlement, stating it does not affect any substantive change to their settlement but merely corrects inadvertent non-substantive clerical errors in the version originally filed with the Commission on June 12, 2006.

11. On August 9, 2006, the Presiding Judge certified the AMP-Ohio Settlement to the Commission as a Contested Partial Settlement. In the certification order, the Presiding Judge finds that FirstEnergy's allegation that the AMP-Ohio Settlement may cause other LSEs to bear a portion of the SECA obligation currently assigned to Green Mountain raises concerns over a hypothetical outcome of a legal issue currently before the

[4] Pennsylvania Electric Company, Metropolitan Edison Company, Jersey Central Power & Light Company, Cleveland Electric Illuminating Company, Ohio Edison Company, Toledo Edison Company, and Pennsylvania Power Company.

Commission. The Presiding Judge adds that the mere allegation that non-settling parties may be adversely affected by the AMP-Ohio Settlement does not raise a genuine issue of material fact without any additional facts, and thus the modification requested FirstEnergy is unnecessary. In addition, the Presiding Judge states that the AMP-Ohio Settlement sets no precedent as to non-settling parties, and thus does not impact their right to continue to litigate in the instant proceedings. The Presiding Judge also notes that, under section 5.4 of the AMP-Ohio Settlement, modifications to it requested by a settling party will be subject to the public interest standard under the *Mobile-Sierra* doctrine, and the most stringent standard permissible under applicable law will apply to modifications requested by a non-settling party or the Commission.

Docket No. ER05-6-085, *et al.*

12. On August 11, 2006, in Docket No. ER05-6-085, *et al.*, AEP and the Multiple Transmission Dependent Utilities (MTDU)[5] filed a Settlement Agreement (MTDU Settlement) resolving all SECA issues between them set for hearing in the above-captioned dockets.

13. Section 3.1 of the MTDU Settlement provides settlement amounts for which each TDU accepts responsibility to AEP, and notes that each respective TDU represents that it has already paid in full the SECA charges billed. Thus, section 3.2 sets forth refund amounts for each TDU based on each TDU's representations in section 3.1. In the Explanatory Statement to the MTDU Settlement, AEP and MTDU state that these proceedings involve compliance matters before the Commission, and in relevant part are subject to the Commission's just and reasonable standard.

14. On August 16, 2006, FirstEnergy filed comments in this proceeding, stating that it does not oppose the MTDU Settlement as long as AEP agrees to waive any right to collect revenue from other LSEs and load within the Midwest ISO and PJM regions that AEP has or otherwise could have collected from MTDU. Specifically, FirstEnergy argues that the Presiding Judge's Initial Decision in this proceeding recommends reallocation of lost revenues on a combined region-wide or regional organization-wide basis, and FirstEnergy claims that SECA obligations currently allocated to MTDU thus may be reallocated to other LSEs. FirstEnergy asks that the Commission modify the MTDU Settlement to protect other LSEs and load within the Midwest ISO and PJM

[5] They are: Indiana Municipal Power Agency, Old Dominion Electric Cooperative, Inc., Blue Ridge Power Agency (as agent for Bedford, Danville, Martinsville, Richlands, and Salem, Virginia), Central Virginia Electric Cooperative, Inc., Michigan Public Power Rate Payers Association (Cities of Chelsea, Eaton Rapids, Hart, Portland, and St. Louis, Michigan), Wayne-White Counties Electric Cooperative, and Bay City, Michigan.

regions from AEP attempting to collect lost revenues that were previously assigned to, or otherwise could have been collected from, MTDU. Alternatively, FirstEnergy states that AEP could satisfy this concern by agreeing in reply comments to forego the collection of such amounts from other load or LSEs within the Midwest ISO or PJM, as applicable.

15. On September 8, 2006, AEP and the MTDU filed reply comments opposing FirstEnergy's proposed modification because they maintain that the MTDU Settlement protects non-settling parties from impacts resulting from it, and thus modifications are not warranted. They also argue that the MTDU Settlement is not intended to protect non-settling parties from impacts that would result from adopting the Initial Decision in these proceedings or any other impacts beyond the MTDU Settlement itself.

Discussion

16. As a preliminary matter, we note that our authority to approve settlements is an essential regulatory tool and the wide discretion afforded in this area is supported by the broad public interest favoring the settlement of complex matters. More particularly with regard to all three settlements discussed below, the fact that a settlement does not resolve all issues as to all parties is not a deterrent to its approval. In this regard, we emphasize that settlements may be proposed by fewer than all the participants in a proceeding, and the Commission may approve such settlements for the consenting parties.[6]

DTE Settlement

17. In Docket No. ER05-6-061, *et al.*, we note that the only commenter opposing the DTE Settlement is AMP-Ohio. AMP-Ohio is concerned that the DTE Settlement will impose additional costs on non-settling parties. Thus, AMP-Ohio asks that the Commission accept the DTE Settlement only if it is either modified to protect non-settling parties from additional charges resulting from the DTE Settlement, or if the settling parties confirm that the DTE Settlement is not intended to result in the imposition of additional costs on non-settling parties.

18. However, Commission Trial Staff states that the DTE Settlement will not affect non-settling parties. More importantly, in their reply comments, DTE Parties and the

[6] *See Colorado Interstate Gas Company*, 93 FERC ¶ 61,185 at 61,613 (2000), *reh'g denied*, 94 FERC ¶ 61,151 (2001), and cases cited therein.

Transmission Owner Settling Parties likewise confirm that the DTE Settlement is not intended to adversely affect non-settling parties.[7]

19. AMP-Ohio states that the Commission could approve the DTE Settlement if the settling parties confirmed that the DTE Settlement was not intended to result in the imposition of additional costs on non-settling parties, and we find that DTE Parties and the Transmission Owner Settling Parties have complied with AMP-Ohio's request and have confirmed that the DTE Settlement was not intended to adversely affect non-settling parties.[8]

20. We find that the DTE Settlement is thus uncontested and is, as well, fair and reasonable and in the public interest, and is hereby approved. Under the DTE Settlement, the standard of review for any modifications to this settlement requested by a settling party that are not agreed to by all settling parties shall be the public interest standard under the *Mobile-Sierra* doctrine. The standard of review for any modifications requested by a non-settling party and the Commission will be the most stringent standard permissible under applicable law.[9] The Commission's approval of the DTE Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

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[7] In addition, the Presiding Judge states that there are no issues of material fact preventing certification of the DTE Settlement since, the Presiding Judge found, AMP-Ohio did not provide any factual evidence to show that it will be obligated to pay additional SECA charges as a result of the DTE Settlement.

We agree with the Presiding Judge that AMP-Ohio's claim that it may be adversely affected by the DTE Settlement is an unsubstantiated allegation, without concrete facts to supporting its allegation.

[8] In any event, section 4.5 of the DTE Settlement states that it "does not in any manner affect the amount of lost revenue any transmission owner may claim against any party to the SECA Proceedings, nor does it affect the potential defense any other party might have to any claimed lost revenue responsibility." Thus, we find that the DTE Settlement provides sufficient protections against adverse effects on non-settling parties, and we see no reason to modify it as AMP-Ohio requests. *Enron Power Marketing, Inc.*, 115 FERC ¶ 61,377 at P 25-27 (2006); *Natural Gas Pipeline Company of America*, 67 FERC ¶ 61,174 at 61,614 (1994).

[9] As a general matter, parties may bind the Commission to a public interest standard of review. *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 960-62 (1st Cir. 1993). Under limited circumstances, such as when the agreement has broad applicability, the Commission has discretion to decline to be so bound. *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 286-87 (D.C. Cir. 2006). In this case we find that the public interest standard should apply.

21. This order terminates Docket Nos. ER05-6-061, EL04-135-063, EL02-111-081, and EL03-212-077.

AMP-Ohio Settlement

22. In Docket No. ER05-6-070, *et al.*, we note that the only commenter opposing the AMP-Ohio Settlement is FirstEnergy. FirstEnergy asserts that it does not oppose the AMP-Ohio Settlement as long as AEP agrees to waive any right to collect revenue from other LSEs and load within the Midwest ISO and PJM regions that AEP could otherwise have collected from AMP-Ohio. Specifically, FirstEnergy alleges that the AMP-Ohio Settlement may cause other LSEs to bear a portion of the SECA obligation currently assigned to Green Mountain.

23. In their reply comments, AMP-Ohio and AEP state that the AMP-Ohio Settlement does not adversely affect non-settling parties, including other LSEs in the Midwest ISO and PJM region, and that their settlement is intended only to resolve remaining issues among AMP-Ohio and AEP. They add that FirstEnergy does not raise a genuine issue of material fact demonstrating that FirstEnergy's load could be adversely affected by the AMP-Ohio Settlement.[10]

24. FirstEnergy's allegation that non-settling parties may be adversely affected by the AMP-Ohio Settlement is addressed in section 4.9 of AMP-Ohio Settlement, which states that this settlement "does not in any manner affect the amount of lost recovery revenue any transmission owner may claim against any other party to this proceeding, nor does it affect any potential defenses any other party might have to any claimed lost revenue

[10] The Presiding Judge states that FirstEnergy's allegation that the AMP-Ohio Settlement may cause other LSEs to bear a portion of the SECA obligation currently assigned to Green Mountain raised concerns over a hypothetical outcome of a legal issue currently before the Commission. The Presiding Judge adds that the mere allegation, without any additional facts, that non-settling parties may be adversely affected by the AMP-Ohio Settlement does not raise a genuine issue of material fact and thus the modification to the AMP-Ohio Settlement requested FirstEnergy is unnecessary.

We agree with the Presiding Judge that FirstEnergy's concerns are speculative, and that FirstEnergy's arguments raise only hypothetical issues. *See supra* notes 7-8. Moreover, since the Initial Decision in these proceedings, *see Midwest Independent Transmission Operator, Inc., et al.*, 116 FERC ¶ 63,030 (2006), is pending before the Commission, we would be prejudging the issues presented in the Initial Decision if we addressed FirstEnergy's speculative concerns and hypothetical issues here. *See California Independent System Operator* Corporation, 112 FERC ¶ 61,310 at P 33 (2005); *Pennsylvania-New Jersey-Maryland Interconnection*, 105 FERC ¶ 61,294 at P 37 (2003), *reh'g denied*, 108 FERC ¶ 61,032 at P 8 (2004).

responsibility." Thus, we find that this settlement provides sufficient protections against adverse effects on non-settling parties. Under these circumstances, we see no reason to modify the AMP-Ohio Settlement as FirstEnergy requests.

25. We find that the AMP-Ohio Settlement is thus uncontested and is, as well, fair and reasonable and in the public interest, and is hereby approved. Under the AMP-Ohio Settlement, the standard of review for any modifications to this settlement requested by a settling party that are not agreed to by all settling parties shall be the public interest standard under the *Mobile-Sierra* doctrine. The standard of review for any modifications requested by a non-settling party and the Commission will be the most stringent standard permissible under applicable law.[11] The Commission's approval of the AMP-Ohio Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding.

26. This order terminates Docket Nos. ER05-6-070, EL04-135-073, EL02-111-090, and EL03-212-086.

MTDU Settlement

27. In Docket No. ER05-6-085, *et al.*, we note that the only commenter opposing the MTDU Settlement is FirstEnergy. FirstEnergy comments that it will not oppose the MTDU Settlement as long as AEP agrees to waive any right to collect revenue from other load serving entities and load within the Midwest ISO and PJM regions that AEP has or otherwise could have collected from MTDU. Specifically, FirstEnergy argues that the Presiding Judge's Initial Decision in these proceedings recommends reallocation of lost revenues on a combined region-wide or regional organization-wide basis, and FirstEnergy argues that SECA obligations currently allocated to MTDU thus may be reallocated to other LSEs, and the MTDU Settlement does not protect other LSEs and load within the combined region from AEP attempting to collect lost revenues that were previously assigned to, or otherwise could have been collected from, MTDU. FirstEnergy asks that the Commission modify the Settlement to protect the other LSEs accordingly. Alternatively, FirstEnergy states that AEP could satisfy this concern by agreeing in reply comments to forego the collection of such amounts from other load or LSEs within the Midwest ISO or PJM, as applicable.

28. AEP and MTDU oppose FirstEnergy's proposed modification because it would require AEP and MTDU to protect all non-settling parties from impacts beyond those resulting from their settlement. They argue that Article II of the MTDU Settlement, and particularly section 2.2 (quoted below), protects non-settling parties from impacts resulting from their settlement and modifications are not warranted. They also state that

[11] *See supra* note 9.

their settlement is not intended to protect non-settling parties from impacts that would result from adopting the Initial Decision in these proceedings, or any other impacts beyond their settlement itself.[12]

29. We agree with AEP and MTDU that Article II of the MTDU Settlement protects non-settling parties from impacts resulting from their settlement. Section 2.2 of the MTDU Settlement states that it "does not in any manner affect the amount of lost revenue any transmission owner may claim against any other party to this proceeding, nor does it affect any potential defense any other party might have to any claimed lost revenue responsibility." Thus, we find that the MTDU Settlement provides sufficient protections against adverse effects on non-settling parties.

30. We find that the MTDU Settlement is uncontested and is, as well, fair and reasonable and in the public interest, and is hereby approved. The Commission's approval of the MTDU Settlement does not constitute approval of, or precedent regarding, any principle or issue in this proceeding. The Commission retains the right to investigate the rates, terms, and conditions of the MTDU Settlement under the just and reasonable and not unduly discriminatory or preferential standard of section 206 of the Federal Power Act.

31. This order terminates Docket Nos. ER05-6-085, EL04-135-088, EL02-111-105, and EL03-212-101.

By the Commission. Commissioner Kelly concurring with a separate statement attached. Commissioner Wellinghoff dissenting in part with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

[12] We find that it is premature to address FirstEnergy's concerns regarding the impact of the Presiding Judge's findings in the Initial Decision in these proceedings. Since the Initial Decision is currently pending before the Commission, we would be prejudging our determination on the issues presented in the Initial Decision if we addressed FirstEnergy's concerns here. *See supra* note 9.

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(Issued July 3, 2007)

KELLY, Commissioner, *concurring*:

Two of the three sets of settling parties request that the Commission apply the "most stringent standard permissible under applicable law" with respect to any future modifications proposed by a non-settling party or the Commission acting *sua sponte*. These settlements resolve issues related to the Seams Elimination Cost Adjustment (SECA) monetary obligations between the parties for the period ending March 31, 2006. The settlements are essentially uncontested, do not affect non-settling parties, and resolve the amount of the claimed SECA obligations between the parties for the relevant prior period. The settlements do not contemplate ongoing performance under the settlements into the future, which would raise the issue of what standard the Commission should apply in reviewing any possible future modifications. Indeed, in a sense, the standard of review is irrelevant here. Therefore, while I do not agree with the order's reasoning regarding the applicability of the *Mobile-Sierra* "public interest" standard of review (*see* footnote 9), I concur with the order's approval of these settlement agreements.

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Suedeen G. Kelly

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(Issued July 3, 2007)

WELLINGHOFF, Commissioner, dissenting in part:

In Docket No. ER05-6-061, *et al*. and Docket No. ER05-6-070, *et al*., the parties have asked the Commission to apply the "public interest" standard of review when it considers future changes to their settlements that may be sought by any of the parties. With regard to such changes sought by either a non-party or the Commission acting *sua sponte*, the parties have asked the Commission to apply the most stringent standard permissible under applicable law. In response to the latter request, the Commission states that the "public interest" standard should apply to future changes sought by a non-party or the Commission acting *sua sponte*.

Because the facts of this case do not satisfy the standards that I identified in *Entergy Services, Inc*.,[1] I believe that it is inappropriate for the Commission to grant the parties' request and agree to apply the "public interest" standard to future changes to the settlement sought by a non-party or the Commission acting *sua sponte*. In addition, for the reasons that I identified in *Southwestern Public Service Co*.,[2] I disagree with the

[1] 117 FERC ¶ 61,055 (2006).

[2] 117 FERC ¶ 61,149 (2006).

Commission's characterization in this order of case law on the applicability of the "public interest" standard.

Finally, it is worth noting that the standard of review is, in a sense, irrelevant here for the reasons set forth in Commissioner Kelly's separate statement.

For this reason, I respectfully dissent in part.

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Jon Wellinghoff
Commissioner